THE LAW OF PENNSYLVANIA RELATING TO ILLEGITIMACY[1]

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The aim of this committee has been to collect and summarize the authorities bearing upon the present attitude of the law of Pennsylvania toward the various problems arising out of the birth of illegitimates, and further to examine the existing laws of other jurisdictions with a view to securing from such jurisdictions any administrative or substantive features which might tend to improve the Pennsylvania law or procedure.

It may be said of practically all jurisdictions, however, by way of introduction, that the general attitude of the law has reflected the general change of public opinion, and has been steadily advancing from the old, rigid English notion that an illegitimate was a "filious nullius" with no right of inheritance or name,[3] toward the much more just and equitable view that, wherever the blame may belong, certainly it does not belong upon the unfortunate child who has thus, without any choice in the matter, been furnished with the responsibility of a life to live. All present day tendencies, therefore, are toward relieving the unfair legal and social position of the child by compelling the father to provide for the adequate support of the child and by removing the disabilities, legal, moral and social, under which the child has formerly struggled.

For the purpose of better analyzing the questions to be considered, we have divided our report under seven headings which we shall consider in turn; and first:

I. WHAT CONSTITUTES ILLEGITIMACY?

An illegitimate under the law of Pennsylvania may be defined as one conceived out of wedlock and not subsequently legitimated.

(1) "Conceived out of wedlock" means that the parents at the time of conception were not "legally married." It must be remembered, however, that in Pennsylvania "legal marriages" are not confined to marriages performed by a clergyman or public official in

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[3]Blackstone, Vol. I, p. 459.

accordance with the directions of a marriage license. On the contrary, the law of Pennsylvania recognizes the so-called "common law marriages" as just as valid and binding as the most elaborate of ceremonies. Evidence that the man and woman agreed to live together as man and wife, and thereafter did so live together openly, holding themselves out to be man and wife, is usually sufficient to establish a common law marriage,[3a] and the children of such a marriage are just as legitimate in every respect as if their parents had been married by a religious ceremony. The practical objection to common law marriages is, of course, the difficulty of securing the necessary proof when required.

Some marriages performed with the utmost ceremonial, on the other hand, may be entirely void, and the children therefore illegitimate. This is true in the case of bigamous marriages, even though there is no wrong intention, as where, for example, the first husband or wife is believed to be dead. Another instance of a similar character is where the parties are within the prohibited degrees of consanguinity or affinity. Here the marriage is void[4] and the children are illegitimate, if the marriage is attacked during the lifetime of the parties of the marriage; although if the question is not raised until after the death of one of the parties, the courts will not consider the children illegitimate.[4a]

As a general rule, it may be said that a marriage valid according to the laws of the place where the marriage takes place is recognized as valid anywhere, and the children are therefore legitimate. This principle is not followed, however, where the marriage is considered to be clearly against the public morals of the state which is asked to recognize it[5], as where, for example, the marriage would constitute incest according to the law of such state[6]. Where, however, the marriage is merely within the degrees forbidden by law, but is not considered incestuous or clearly immoral, as in the case of first cousins in Pennsylvania, then if valid where entered into, it will be recognized

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[3a] For typical instances of common law marriages which have been held to be valid, see:
Richard vs. Brehm, 73 Pa. 140 (1873).
Janney's Estate, 2 Dist. Rep. 145 (1892).
Comly's Estate, 185 Pa. 208 (1898).
[4] Act of March 31, 1860, P. L. 392, § 39, 1 Purd. Dig. 966.
[4a] Adams Est., 6 Pa. C. C. 591 (1889).
[5] Stull's Est., 183 Pa. 625 (1898).
[6] Thus, where an uncle married his niece in Russia, where the marriage was permissible, he was not permitted to settle in Pennsylvania, but was deported United States vs. Navigation Co., 10 Dist. Rep. 480 (1901).

in Pennsylvania[7], even though the parties were residents of Pennsylvania and were married in another state for the express purpose of evading the statute[8].

(2) As we have said above, however, the child, to be illegitimate must not only be "conceived out of wedlock," but must not have been "subsequently legitimated." A child may become legitimated in only one of two ways: either by the subsequent marriage of the mother and father, or by adoption. The subsequent marriage and cohabitation of the father and mother, no matter how long afterward, *ipso facto* legitimates their children[9], even though the parents be within the prohibited degrees of affinity (provided in this latter case that the marriage is not attacked until after the death of one of the parties).[10] Moreover by adoption the father can voluntarily place the child upon an equal footing with his legitimate children.[11] If there is any criticism of the procedure in adoption cases, it is that the courts grant these petitions too much as a matter of form and without any real investigation. Thus it is possible for unscrupulous persons to make a business of relieving mothers of their illegitimate children and having them adopted. Some such cases have been discovered. This could be avoided if the court would appoint a probation officer who would investigate and report on the facts before the court granted an adoption petition.

Passing now from the question as to what in law constitutes illegitimacy, it may be well, since one of the elements of illegitimacy is illicit sexual intercourse, at this point to consider the attitude of the law toward illicit intercourse itself in its various forms, and also toward the attempts that are frequently made to prevent the natural result of such intercourse.

II. ATTITUDE OF THE LAW TOWARD ILLICIT INTERCOURSE AND ATTEMPTS TO PREVENT CHILDBIRTH.

We shall attempt briefly to summarize the existing law as it deals with the various criminal offences arising out of illicit intercourse and attempts to prevent the birth of children, but as any "summary" of a statute is always dangerous, we shall cite in the footnotes the

[7]Comm. vs. Isaacman, 16 Dist. Rep. 18 (1906).
[8]Schofield vs. Schofield, 51 Super. 564 (1912).
[9]Act May 14, 1857, P. L. 507, §1; 3 Purd. Dig. 2445.
See also: McCausland's Estate, 213 Pa. 189 (1906).
[10]Adams Est., 6 Pa. C. C., 591 (1899).
See also *post*: Incest.
[11]Act April 22, 1905, P. L. 297, 5 Purd. Dig. 5227; Act June 1, 1911, P. L. 539, 5 Purd. Dig. 5228; Act May 28, 1915, P. L. 580, 5 Purd. Dig. 5228.

references to the original statutes themselves, which should in every case be consulted.

(1) *Fornication* is sexual intercourse between persons who are not husband and wife. The penalty is a fine of not over $100.[12] Unless the unlawful act is committed in some more or less public place such as a park, or in a disorderly house, or unless the woman becomes pregnant, the offence is seldom met with in court.

(2) *Fornication and Bastardy* consists of fornication with the added element that as a result thereof the woman bears a child.[13] This is the offense upon which are based the proceedings for the support of the child, and the proceedings to establish the paternity of the father. As this procedure furnishes the main subject of our present inquiry, we shall devote to it the entire third division of our report, *q. v.*

(3.) *Adultery* consists of fornication by a married person. Where one party is married and the other unmarried, it will be adultery as to the former and fornication as to the latter. The penalty is a fine not exceeding $500 and imprisonment not exceeding one year, or both or either.[14]

(4.) *Seduction* consists of fornication with a woman of good repute under 21 years of age, by means of seducing her under promise of marriage. The penalty is a fine of not exceeding $5,000 and imprisonment not exceeding three years, or both or either.[15]

(5.) *Incest* is either fornication within, or intermarrying and having intercourse within, the following degrees of consanguinity or affinity.

Degrees of Consanguinity.

A man may not marry his mother.
A man may not marry his father's sister.
A man may not marry his mother's sister.
A man may not marry his sister.
A man may not marry his daughter.
A man may not marry the daughter of his son or daughter.
A woman may not marry her father.
A woman may not marry her father's brother.
A woman may not marry her mother's brother.

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[12]Act of March 31, 1860, P. L. 392, §37, 1 Purd. Dig. 955.
[13]Id.
[14]Act of March 31, 1860, P. L. 392, §36, 1 Purd. Dig. 903.
[15]Act of March 31, 1860, P. L. 392, §41, 1 Purd. Dig. 1010.

A woman may not marry her brother.
A woman may not marry her son.
A woman may not marry the son of her son or daughter.

Degrees of Affinity.

A man may not marry his father's wife.
A man may not marry his son's wife.
A man may not marry his son's daughter.
A man may not marry his wife's daughter.
A man may not marry the daughter of his wife's son or daughter.
A woman may not marry her mother's husband.
A woman may not marry her daughter's husband.
A woman may not marry her husband's son.
A woman may not marry the son of her husband's son or daughter.[16]

The penalty for incest is a fine not exceeding $500 and imprisonment by separate or solitary confinement at labor not exceeding three years. All such marriages are also declared to be void.[17]

The intermarriage of first cousins has also been prohibited in Pennsylvania though the prohibitory act does not make it a criminal offense; the marriage is simply forbidden by the act.[18]

(6.) *Prostituting, Etc. Child Under 16.* "Any person who takes a female child under the age of sixteen years for the purpose of prostitution or sexual intercourse, or, without the consent of her father, mother, guardian or other person having legal custody of her person, for the purpose of marriage, or who inveigles or entices any such minor female child into a house of ill-fame, or of assignation, or elsewhere, for the purpose of prostitution or sexual intercourse, shall, in every such case, be guilty of a misdemeanor, and upon conviction thereof, shall be sentenced to imprisonment, at separate or solitary confinement at labor, for not more than five years, or pay a fine, not exceeding one thousand dollars, or both, at the discretion of the court."[19]

(7) *Rape* embodies (a) the unlawful carnal knowledge of a woman *forcibly* and *against her will;* or (b) the unlawful carnal

[16]Act of March 31, 1860, P. L. 392, §39, 1 Purd. Dig. 966. Any one desiring to consult the provisions of the laws of other states and countries in respect to the prohibited degrees of consanguinity or affinity will find them conveniently summarized in a work entitled "Marriage and Divorce Laws of the World," by Ringrose (1910).
[17]Act of March 31, 1860, P. L. 392, §39, 1 Purd. Dig. 966.
[18]Act of June 24, 1901, P. L. 579, 3 Purd. Dig. 2445.
[19]Act of May 25, 1885, P. L. 27, §39, 1 Purd. Dig. 1005.

knowledge by a man, 16 years or over, of a girl under sixteen, *with or without her consent.* The penalty is a fine not exceeding $1,000 and imprisonment by separate or solitary confinement at labor, or by simple imprisonment not exceeding 15 years.[20] In the case of an alleged rape of a girl under 16 years, however, the statute provides that if the jury find that the girl was not of good repute, and that the carnal knowledge was with her consent, then the defendant shall be convicted of fornication only.[21]

(8.) *Bigamy* consists of having two husbands or two wives at the same time. The offence of bigamy is committed whenever the two marriages have been entered into according to forms recognized as valid by the laws of the jurisdiction where the respective marriages took place; and it is immaterial whether or not one of the marriages is in reality void by reason of some other circumstances. In other words, any prior marriage, the form of which was legally valid (even though the marriage may be void for other reasons) must be legally declared void or annulled before either of the parties is free to re-marry without committing the offence of bigamy. Penalty: fine not exceeding $1,000 or imprisonment not exceeding two years or both; but this penalty is not imposed where the second marriage was made upon a well founded belief that the first husband or wife was dead, having been absent for two years. It is also unlawful for an *unmarried* person knowingly to marry the husband or wife of any other person. Penalty: fine not exceeding $500 or imprisonment not exceeding two years or both.*

It will be seen that practically all of these crimes are aggravated forms of and include the lesser crime of fornication, so that where a child has been born, a conviction for fornication and bastardy may be had, even though the defendant be indicted for one of the more serious crimes.[22] This is as it should be and avoids technicalities and delays.

In addition to the foregoing crimes, all of which are concerned with the illicit act of intercourse itself, we have a series of criminal offences in connection with the prevention of conception, pregnancy and birth, the natural results of such intercourse. Thus, the law while it forbids one to indulge in illicit intercourse, at the same time, with equal firmness forbids one to endeavor to undo the probable

[20]Act of May 19, 1887, P. L. 128, §1, 1 Purd. Dig. 1005.
[21]Id.
[22]Comm. vs. Parker, 146 Pa., 343 (1892).

*Act of March 27, 1903, P. L. 102.

and natural results of such intercourse. The law as it at present deals with the prevention of conception, pregnancy, and birth may be briefly summarized as follows:

(9.) *Nostrums.* It is unlawful to print or publish in any newspaper in Pennsylvania advertisements of medicines, drugs, instruments or apparatus for the cure of secret or venereal diseases, or diseases peculiar to women; or in any way to publish, circulate, or distribute an account or description of such medicines, drugs, etc. Penalty: fine not exceeding $1,000 or imprisonment not exceeding six months or both.[23]

It is also unlawful for any druggist or other person to sell, keep for sale, or give away any secret drug or instrument purporting to be for the use of females; or to keep for sale or gratuitous distribution, or to publish an account or description of, any secret drug, medicine, instrument or apparatus for preventing conception or procuring abortion. Teaching in chartered medical colleges and the publication of standard medical books are however, expressly excepted from the provisions of this act. It is further unlawful to sell, lend or give away, or to have in one's possession for any of such purposes, any recipe, drug or medicine for the prevention of conception or the procuring of abortion; or to make representations that it can be so used or applied. It is even unlawful to give information either orally or in writing as to where, how, or of whom such an instrument, article, recipe, etc., can be purchased or obtained. Penalty: fine not exceeding $1,000 or imprisonment not exceeding six months or both. All such articles, moreover, are subject to seizure upon warrant issued by a magistrate.[24]

(10.) *Abortion* consists in unlawfully administering to a pregnant woman, or to one believed to be pregnant, any drug, poison or other substance, or unlawfully using any instrument or other means, with intent to procure a miscarriage. If the woman dies as a result thereof, the penalty is a fine not exceeding $500 and imprisonment not exceeding 7 years. If the woman does not die the penalty is a fine not exceeding $500 and imprisonment not exceeding 3 years. It is also unlawful for any woman to conceal the death of any child which if born alive would have been illegitimate. Penalty: imprisonment not exceeding 3 years.[25]

Having seen the attitude of the law in general toward these various

[23]Act of March 16, 1879, P. L. 40 §§1, 2.
[24]Act of May 12, 1897, P. L. 63, §§2, 3.
[25]Act of March 31, 1860, P. L. 397, §§87, 88, 89.

sex crimes, let us now turn to the main subject of our inquiry, namely, the existing provisions of the law of Pennsylvania in respect to the birth and support of illegitimates.

III. PRACTICAL PROCEDURE IN CASES OF ILLEGITIMACY IN PENNSYLVANIA.

It will be more accurate if we confine this topic to Philadelphia County, and not to Pennsylvania at large, for it is our purpose to describe the procedure now in operation in the Municipal Court of Philadelphia, which court, together with the Municipal Court of Allegheny County, have made long strides in advance of the old Quarter Sessions procedure. We have, moreover, found it convenient to divide our discussion of fornication and bastardy proceedings into six subdivisions, and to consider in turn these six questions: (1) The Court's Jurisdiction; (2) Procedure and Trial; (3) Evidence of Paternity; (4) The Order of Support; (5) Enforcement of Orders; (6) Compromises or Settlements by Agreement.

In taking up these questions in detail, however, it should be borne in mind that fornication and bastardy, although technically a *criminal* offence, in reality partakes very much more of the nature of a *civil* action. The real purpose of the action is not so much to punish as to provide support, and to compensate for lying-in expenses; and the only punitive feature is the fine, which is frequently omitted entirely.

(1) *The Court's Jurisdiction.*

Where the father lives in one state, the mother in another, and the place of the birth of the child may be in still another state or county, it sometimes becomes a very nice question to determine where the fornication and bastardy proceedings should be instituted.

Fortunately, however, our statute has to a large extent definitely provided in certain cases just where the action is to be brought. We may consider four classes of cases which raise jurisdictional questions:

(a) *Where the Child is Begotten Outside Pennsylvania, But Born Within Pennsylvania.* In such cases the statute definitely provides that the prosecution shall be brought in the county where the child is born.[26] No fine will be imposed in these cases, as the fornication took place beyond the jurisdiction, but the usual order for lying-in expenses and support will be made.[27]

[26]Act of March 31, 1860, P. L. 392, §38, 1 Purd. Dig. 957.
[27]Id.

(b) *Where the Child is Begotten Within Pennsylvania, But Born Outside Pennsylvania.* In such cases a prosecution for fornication may be brought in the county where the fornication took place, and the fine will be imposed, but no lying-in expenses or order of support will be awarded.[28]

(c) *Where the Child is Begotten In One County of Pennsylvania, and Born In Another County of Pennsylvania.* Here the statute again expressly provides that the prosecution shall be brought in the county where the child is born, and the fine, as well as the order of support, may be imposed, in like manner as if the fornication and birth had taken place in the same county.[29]

Of course a prosecution for the fornication alone may be brought in the county where the fornication took place, irrespective of the county where the child was born, but a conviction for fornication in that county will bar an indictment for bastardy in the county where the child was born.[30]

(d) *Where the Child is Neither Begotten Nor Born in Pennsylvania.* Here the courts of Pennsylvania have no jurisdiction, even though the mother be a resident of Pennsylvania and the child likely to become a public charge, for technically the action is criminal and no part of the crime has been committed in Pennsylvania.

On the general question of jurisdiction it should also be noted that the statute of limitations is two years, and runs from *the time the fornication is committed,* and not from the birth of the child.[31] Unless therefore prosecution is commenced and an indictment found within two years of the time when the fornication was committed, the court has no jurisdiction whatever. Thus where a woman has had three children by a man to whom she was not married (a recent case brought to the Legal Aid Society), no action can be taken to compel him to support any of the children, where the youngest child is more than one year and three months old. The statute does not run, however, during the absence of the father from the state.

On the whole, however, the question of jurisdiction in Pennsylvania is on a logical and sound basis, and the courts take jurisdiction of all cases that may fairly be said to belong here.

(2) *Procedure and Trial.*

The procedure and trial in cases of fornication and bastardy in

[28]Commonwealth vs. Walker, 2 Dist. Rep. 727 (1893).
[29]Act of March 31, 1869, P. L. 392, §38, 1 Purd. Dig. 957.
[30]Commonwealth vs. Lloyd, 141 Pa. 28 (1891).
[31]Commonwealth vs. Ruffner, 28 Pa. 259 (1857).

the Municipal Court of Philadelphia County has been made very simple.

There is a permanent city department with offices in room 577a City Hall, whose duty it is to care for any woman who may need help from the father of her child, and to assist the Commonwealth in placing the obligation of support where it properly belongs.

A girl who desires to obtain from the father of her child support for the child and lying-in expenses for herself, makes application to this department in City Hall. This application may be made at any time within the statute of limitations, i. e., at any time within two years from the *date of conception*—(not from the date of the child's birth). Ordinarily the earlier the application is made the better; although the trial will never take place until after the birth of the child.

The girl goes to this department in the City Hall and tells her story to a probation officer, who is a married woman and trained social worker, and who explains to the girl her rights under the law..

A warrant is then issued without cost to the girl for the arrest of the alleged father of the child. If the girl is able to give any information as to the whereabouts of the father within the county, the arrest is usually made promptly and quietly by plain clothes sheriffs of the Domestic Relations Division of the Municipal Court. Where the man is working at steady employment (i. e., has been employed at one place five years or longer), the arrest is often effected by agreement with the father, and is made at such time and place as will not jeopardize the retention by him of his position; and he is frequently permitted to sign his own bail bond. Where, however, the man is a "floater," he is arrested without delay, and must either give bail or be imprisoned to await trial.

The first practical difficulty arises where the father is living in another county or in another state at the time the complaint is made. If he is in another *county* in Pennsylvania, he can, theoretically at least, be brought back to Philadelphia County. Practically, however, there are traveling expenses to be incurred in going after him and bringing him to Philadelphia. There is a fund in the hands of the District Attorney's office to be used for this purpose, but the fund is not sufficient for every case which arises. The result is, therefore, that the District Attorney's office is compelled to apply this fund to the cases which, in its judgment, are most deserving. In some cases the District Attorney's office will bear a part of the expense if the prosecutrix will bear the other part. In other cases the department

to which the girl makes her complaint will endeavor to procure the necessary expenses, by interesting private individuals in her case. In these ways most of the deserving cases are properly cared for. As long as any deserving case suffers, however, this feature of procedure should be improved.

On the other hand, if the father is outside of the *state* at the time the complaint is made, there is no procedure at present for bringing him back. In other words, extradition is not, in practice, applied to fornication and bastardy cases. There is no valid legal reason why it should not be applied to these cases; but since extradition is a matter of "comity" between the states under our federal system of government, it is dependent upon the willingness of the asylum state to turn over the man to the demanding state. Under the existing practice, it seems that asylum states are unwilling to act in these cases, giving as a reason the convenient theory that the action of fornication and bastardy partakes more of the nature of a civil than a criminal action. Where, however, the crime of fornication and bastardy can be included in one of the more serious crimes such as seduction or rape,[32] then extradition can be effected and the man returned. In such cases, even though the man is found not guilty of the aggravated crime, yet if he is convicted of fornication and bastardy the order of support is of course made against him.[33] In these cases of extradition for the more serious crimes the expenses are usually paid in full by the District Attorney's office.

After the man has been arrested he is brought before a judge of the Municipal Court for a preliminary hearing. A preliminary hearing, however, will not be held until the pregnancy of the woman has so far advanced as to cause physical transformation, or at least be capable of definite ascertainment by a physician. This hearing is not open to the public, and only the judge, the necessary court officers and those immediately interested in this or other pending cases are present. Unless the charge is so manifestly groundless as to be beyond doubt the judge "holds the man for court," which means that the man is allowed to enter bail and go free until the case comes to trial. If the man cannot furnish bail he is imprisoned to await trial, and as the trial is never held until after the birth of the child, it is possible that a man unable to furnish bail may be imprisoned several months awaiting trial; though in proper cases the judge, sitting as a committing magistrate may consent to have him released on his own bond.

[32]See ante, p.
[33]Comm. vs. Johnston, 12 Pa. C. C. 263 (1892).

After the preliminary hearing the stories of both the girl and the man are carefully investigated by probation officers. In case the department feels fully satisfied as a result of this investigation that the man is not guilty, the facts are stated to the District Attorney, who may order the case dropped. The department also aids the girl in obtaining such medical assistance, hospital care and other social service as she or the baby may require.

The next step is to have the indictment found by the grand jury. No indictment will be laid before the grand jury until after the birth of the child,[34] but as soon thereafter as the mother is able she goes before the grand jury and charges the man with being the father of the child. Only her side of the case is heard, and no attorneys are present to examine or cross-examine her, nor is the public admitted. These proceedings usually take not longer than two or three minutes, and as a general rule consist merely of one question: "Do you charge this man with being the father of the child?" If her statement makes out a prima facie case (as it always does), the grand jury finds what is called a "true bill," and the case is then sent to court. Under the present system of procedure in Philadelphia, a case is usually tried and disposed of finally by the court within two, or at the most three, months after the birth of the child.

When the case is brought to court the trial is before a jury in a court room to which the public is admitted. The District Attorney has before him a summary of the facts as previously presented by both sides, and a representative of the city department is in court to supply details, to testify on matters of controversy such as the actual earning powers of the man and to make any additional inquiries as requested by the court. If the man pleads guilty, he does so quietly at the bar of the court and an order is thereupon made against him by the court. If the man does not plead guilty the case proceeds to trial like any other criminal case, and this brings us to our next subheading, which deals with the question of evidence.

(3) *Evidence of Paternity.*

In discussing the various questions of evidence which arise in proving paternity, we can start with the definite provisions of the statute itself, which are as follows:

"and the man by such woman charged to be the father of

[34]This is the unvarying practice in Philadelphia County, although it has been held in Chester County that a prosecution was not prematurely brought where the indictment was found before the birth of the child: Commonwealth vs. Boeshore, 2 Chest. Co. 115 (1883).

such bastard child shall be the reputed father, and she persisting in the said charge, in the time of her extremity of labor, or afterwards in open court, upon the trial of such person so charged, the same shall be given in evidence, in order to convict such person of fornication." [35]

Where, therefore, a woman in the extremity of labor charges the man with being the father, and later testifies against him in court, this is sufficient evidence to support a conviction, even though she gives no particulars of the time or place where the child was begotten, and even though she has not asserted in so many words that the man ever actually had intercourse with her.[36]

It is not necessary, however, in order to make out a case against the man to prove any declarations in extremity of labor.[37] It is sufficient, and the usual practice is, simply to put the woman on the stand and allow her to tell her story. If her evidence charges the man to be the father of the child, then, after hearing both sides, it is the duty of the jury to determine which story is to be believed. It is not necessary that the woman should be corroborated by any other witnesses, though of course it greatly strengthens her case.

On the other hand, a case may be made out against the man without the evidence of the mother at all, as where, for example, the mother has died and other witnesses have seen the relations between the man and woman. The declarations of the woman in extremity of labor, however, are not sufficient by themselves to support a conviction, but must be accompanied by other evidence of paternity produced in court.[38]

Where the child is born of a married woman, every presumption is in favor of its legitimacy. In order to establish the paternity of a person other than the husband, there must be affirmative evidence from which it can reasonably be inferred that the husband had not had access to the wife during the time when the child was begotten,[39] or else evidence that the husband was impotent.[40] Moreover, neither

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[35]Act of March 31, 1860, P. L. 392, §37, 1 Purd. Dig. 956.

[36]Comm. vs. Phillips, 2 Lack. Jur. 146 (1891).

[37]As to what constitutes "extremity of labor," see Easley vs. Comm. 11 Atl. 220 (1887).

[38]Thus where there was evidence of her declarations in extremity of labor, but the mother did not afterward swear out the warrant, or testify at the trial, the evidence was held insufficient: Comm. vs. Betz, 2 Woodw. 210 (1867); and likewise it is held that where the mother died in labor, her dying declarations as to the paternity of the child are not evidence: Comm. vs. Reed, 5 Phila. 528 (1864).

[39]Comm. vs. Shepherd, 6 Binn. 283 (1814).

[40]Comm. vs. Wentz, 1 Ashm. 269 (1839).

the husband,[41] nor the wife[42] is allowed to prove non-access; and the dying declarations of the wife to that effect are inadmissible.[43] The wife may, however, testify to the illicit intercourse with the third party.[44]

Admissions by the reputed father that he is actually the father, are of course valid evidence and may be testified to at the trial by any one who heard them. The child may also be brought into court and shown to the jury, and any resemblance between the child and the reputed father may be commented on by the District Attorney in his speech to the jury.[45]

Where it can be shown that about the time the mother conceived she had illicit intercourse with more than one man, this disqualifies her as a witness to prove who was the father, and the jury will be instructed that if they believe that she did have intercourse at that time with a person other than the defendant, then she is not competent to say who the father is.[46] In like manner the prosecutrix may be asked the question, whether or not, at or about the time of conception, she had intercourse with any one other than the defendant.[47] Evidence of the girl's reputation for unchastity, however, is irrelevant and not admissible, unless accompanied by proof of acts of fornication with others at or about the time of conception.[48]

Considerable criticism[49] has been directed against the foregoing rule that evidence of the mother's relations with another man at the time of conception is fatal to a claim of support, although the rule is almost universal throughout the United States and foreign countries. The rule is, of course, based upon the physical impossibility of determining which man is the father; and even resemblances between the child and one of the men would be very precarious evidence under such circumstances. It has remained for Denmark to cut the Gordian knot by allowing the conviction of any one of the men who have had intercourse with the woman at the time of conception, and then allow-

[41]Comm. vs. Reed, 5 Phila. 528 (1864).
[42]Comm. vs. Stricker, 1 Browne 47 (1811) (Appendix)
[43]Comm. vs. Reed, 5 Phila. 528 (1864).
[44]Comm. vs. Phillips, 2 Lack. Jur. 146 (1891).
[45]Thus it has even been held that the District Attorney was entitled to hold a 16 months baby up before the jury and shout: "If they are not the ears of the defendant, acquit him!" Comm. vs. Pearl, 33 Super. 97 (1907).
[46]Comm. vs. McCarty, 4 Pa. L. J. 136 (1844).
[47]Comm. vs. Fritz, 4 Clark 219 (1848).
[48]Comm. vs. Dotterer, 14 Dist. Rep. 513 (1904).
[49]Lord Ardwell, in a dissenting opinion in England says: "It will, I fear, become a favorite device of village Lotharios to hunt girls in couples." Judicial Rev., July 1909, vol. 21, p. 185. See also an article by Borosini in Journal of Criminal Law, vol. 4, p. 212.

ing that man to recover contribution from all the others.[50] This solves the question of support, though of course it cannot determine the question of paternity.

After all the evidence has been submitted to the jury, they return a verdict of "guilty" or "not guilty." The woman is, of course, equally guilty of fornication, but proceedings are almost never brought against her when a child has been born. If the verdict against the man is "guilty," it is the court's duty to impose the penalty, which brings us to our next subject.

(4) *The Order of the Court Upon Conviction.*

The statute provides that after conviction the father shall be sentenced to pay a fine not exceeding $100, the expenses incurred at the birth of the child, and "to perform such order for the maintenance of the said child, as the court * * * shall direct and appoint." [51]

It will be seen, therefore, that with the exception of a maximum amount for the fine, the sentence is left entirely to the discretion of the court. The fine is often reduced or omitted entirely, according to the surrounding circumstances of each case.

The expenses incurred at the birth of the child of course vary with the medical attention and other expenses of each confinement. In at least one case[52] this part of the order has included expenses of the mother while incapacitated prior to the actual labor; and if the mother is totally incapacitated for several weeks before the arrival of the child, there would seem to be no valid reason why the act should not be liberally construed in this regard. As a rule the average sum allowed for these expenses is about $25.00.

Where the child is still-born it is the present practice to award the mother her lying-in expenses and also funeral expenses for the child.

The order of maintenance has also been subject to considerable fluctuation. It is interesting to note that a judge who has sat in the Juvenile Court and there come in contact with the actual cost of boarding a child, is inclined to be more liberal in the matter of orders of support in bastardy cases. The order of maintenance may be awarded either in a gross sum or in weekly installments.[53] It is the general custom, however, to award it in weekly installments, not only because

[50] Journal of Criminal Law, vol. 4, page 212.

[51] Act of March 31, 1860, P. L. 392, §37, 1 Purd. Dig. 956.

[52] Comm. vs. Susneck, Phila. Co., Jan. Term 1916, No. 677. In another case the order included expenses for necessary clothing as incident to confinement; See: Comm. vs. Walsh, Phila. Co., April Term 1916, No. 316.

[53] Sheffer vs. Rem. Publicam, 3 Yeates 39 (1800).

it is more easily paid in that form by the father, but because that has proved to be much the best method for the welfare of the mother and child. The orders are usually made payable to the mother, though the court may in its discretion order payment to be made to any other person.[54] Payments are made through the city department, however, and not directly from the father to the mother. The amount of the award varies from $1.50 to $3.00 per week, the great majority of orders being $2.00 or $2.50 per week, or the court may even make a graduated order where the man's prospects warrant it.[55] These orders are payable weekly until the child reaches a certain age; the age is entirely in the discretion of the court. Until recently it was the uniform practice to fix the age at 7 years, though why that limit was determined upon is difficult to understand, inasmuch as the child at that age was becoming more of an expense to its mother than ever before. For the past two years in Philadelphia County the judges have very wisely extended the age limit to 14 years, and recently it has been still further extended to 16 years, by analogy to the child labor and education law of 1915.

Since the order is purely for the support of the child, it abates upon the death of the child and the father is relieved of further payments.

After the order is made, the man is supposed to enter security This usually consists merely of having the man sign his own bond, and if he has no property this bond is of little or no importance. Practically its only usefulness in such case is to facilitate suit and judgment against the man in another state, in case he has property there. The court in this matter is more or less in a dilemma for if it insists upon good security the man may be unable to furnish it, and will then simply go to jail where, under the existing law, he is unable to earn anything. In that case all possible means of support for the child are cut off. In a good many cases, however, the man would undoubtedly be able to enter good security rather than go to jail, and if the court insisted upon having such security, except in cases where the court was convinced that the man would simply be compelled to go to jail, the collection of the orders would be greatly facilitated.

After the order is made, however, the very practical question is

[54]Comm. vs. Strayer, 43 Pa. 61, (referred to in opinion of Court at p. 61).

[55]Thus in a recent case the order was made for $2.00 a week until July 1, and $3.00 a week thereafter until the child reached 14. Comm. vs. Brinker, Phila. Co., Feb. Term 1916, No. 295. In accord: Comm. vs. Smith, Phila. Co., April Term, 1916, No. 571.

how to collect the money, and this is the subject of the following division of our report.

(5) *Enforcement of Orders of Support.*

In general it may be said that the sentence of the court may be enforced either by process against the body of the defendant or against his property; and furthermore that the defendant cannot relieve himself from liability by offering to take the custody of and maintain the child.[56]

Process against the body consists of imprisonment in the county jail for such period as the court shall direct. Here again the first problem is often how to apprehend the man, for he may have betaken himself to another state after the order is made against him, in which case the authorities, just as in the case of his original arrest, are unable to have him returned. An unfair distinction exists in this respect, for it *is* possible on the basis of the Act of March 13, 1903, P. L. 26, to secure the return of a father who has deserted and failed to support his *legitimate* child.

Resort to imprisonment, even where the man is within the county, however, is usually not had until the man has had a full opportunity to comply with the sentence and has failed; for as we have seen before, his imprisonment makes the support of the child an absolute impossibility. The Act of June 12, 1913, P. L. 502, commonly known as the "Stone-pile Act," providing for putting the man at hard labor and having the county pay his family 65c a day, was passed to remedy this situation as far as the support of *legitimate* children is concerned, but it has no application to support in fornication and bastardy proceedings. Moreover, as far as payment by the county is concerned, this act has recently been held unconstitutional by the Superior Court (62 Super. 458), though an appeal from this decision is awaiting determination in the Supreme Court.

If the man is imprisoned, moreover, and remains imprisoned for a period of 3 months, he can secure his discharge under the insolvency laws,[57] or even without insolvency proceedings, under the act of May 6, 1887, P. L. 86, as amended by the last session of the Legislature;[58]

[56]Directors of Poor vs. Dungan, 64 Pa. 402 (1870).

[57]Comm. vs. Dee, 14 Super. 640 (1900). Prior to this decision of the Superior Court, the question was in great doubt. Some lower courts held that he could be arrested again for payments accruing after his discharge: Comm. vs. Miller, 3 W. N. C. 301 (1877); at least where it was alleged that he possessed after-acquired property: Comm. vs. Faulkner, 3 W. N. C. 540 (1877). Other lower courts held that his discharge was a complete bar to further arrests: Comm. vs. Cook, 4 W. N. C. 333 (1877); Comm. vs. Kyler, 1 Pa. C. C. 159 (1885).

[58]Act of May 6, 1915, P. L. 266.

and is thereafter immune from arrest in this proceeding at any future time, either for payments accruing prior or subsequent to his discharge. Nor can he thereafter be arrested under the Non-Support Act of 1867, for failure to support his child, for that act applies only to the support of legitimate children.[59]

This does not mean, however, that his *liability* is extinguished, but only that the process against his *body* has been exhausted. The remedies against his *property* still remain, both as to unpaid installments which have accrued before or after his discharge.[60]

The remedies against his property are the usual processes of execution against either real or personal property, and these processes have been supplemented by a further Act of Assembly which provides that the sentence of the court for the full amount payable in installments with interest and costs may be entered by the mother as a judgment against the defendant in the Prothonotary's office, and upon any default appropriate writs of execution shall issue.[61] It is further provided that wages and salaries may be attached and no exemptions will be allowed.[62]

This act may possibly be held to alter the general rule that a sentence in fornication and bastardy proceedings is a "personal punishment," and therefore dies with the person against whom it is made. In other words, the estate of a father who has died has heretofore been held not liable for any installments accruing subsequent to the death of the father.[63] This seems a most unfair rule, and quaere whether in view of this act of 1907 allowing the sentence to be entered up as a judgment, the courts will not treat such a judgment like any other judgment and modify the old rule by subjecting the father's estate to the payment of the judgment.

In concluding this discussion of the practical means of enforcing the duty of support imposed upon the father by the sentence of the court, it may be well to call attention to the fact that the father of an illegitimate child is held to owe no liability whatever to the child or its mother other than these duties imposed upon him by the statute relating to fornication and bastardy proceedings. Where, therefore, he has complied in all respects with the order or sentence of the court, he is not liable for any other expenses of the child subsequently incurred, as, for example, medical or funeral expenses.[64]

[59]Comm. vs. Clark, 2 Pa. C. C. 311 (1885).
[60]Comm. vs. Snyder, 4 Pa. C. C. 261 (1887).
[61]Act of June 7, 1907, P. L. 429, §§1, 2; 5 Purd. Dig. 5852.
[62]Id. §3.
[63]Philadelphia vs. Haslitt, 14 Phila. 138 (1880).
[64]Miller *v.* Watt 11 Dist. Rep. 439 1901).

(6) *Compromises, or Settlements by Agreement.*

Hitherto we have considered only the compulsory process of a court prosecution. Before leaving the subject of fornication and bastardy proceedings, however, it should be noted that amicable settlements of these proceedings out of court "are not only lawful, but are favored by the public policy of the Commonwealth."[65] Where, therefore, the father and the mother enter into an agreement covering the support of the child, the courts do not consider this the unlawful compromising of a crime, but on the contrary will enforce the agreement;[66] even though the agreement or bond may have been signed by the father while in jail awaiting trial.[67] Such agreements, however, will be enforced only by civil process in civil actions and not by arrest or imprisonment, or by the other means peculiar to the enforcement of orders in fornication and bastardy proceedings.

Since, however, the Commonwealth also has an interest in the matter, it has been held that such an agreement does not bar the bringing of a criminal proceeding by the District Attorney,[68] though as a rule the court before which the criminal action is brought will abide by the agreement of the parties if it an equitable one.[69] As a matter of practice settlements are continually being made, and the decision holding that the settlement is no bar to further criminal prosecution, while theoretically sound, is not apt to make a great deal of difference, as long as the courts in general take the attitude that these amicable settlements are to be favored. On the other hand, this decision of the court leaves a way open to protect a woman who may have been forced into a hasty or unwise settlement. It would seem, however, that all ends could be adequately attained if some method were provided whereby an amicable agreement could be approved by the judge in chambers and thereafter have all the force and effect of a sentence of the court.

In these amicable settlements, however, it is frequently the case that payment is to be made in a lump sum, instead of in weekly installments, and the question then arises, what is a fair sum to give or take in settlement? The circumstances in each case differ so materially, that there cannot be said to be any definite figure which

[65]Comm. *v.* Weaver, 9 Dist. Rep., 427 1899).

[66]Maurer *v.* Mitchell, 9 W. & S., 69 (1845); Rohrheimer *v.* Winters, 126 Pa. 253 (1889).

[67]Pflaum *v.* McClintock, 130 Pa., 369 (1889).

[68]Comm. *v.* Scott, 7 Super., 590 (1898). Neither does it bar, however, the running of the Statute of Limitations; See: Comm. vs. Werner, 5 Super. 249, (1897).

[69]Comm. v. Wicks, 2 Dist. Rep., 17 (1890).

would always be just, but in any particular settlement the following considerations may be kept in mind:

(a) An order of support will probably be at least $2.00 a week until the child is 16 years old, or approximately $1,600. (b) Lying-in expenses will probably be about $25.00. (c) The child, or the father, may not live, however. (d) The girl's character may be such as to make conviction unlikely, and the man may prefer to "take his chance" with the jury. (e) The woman will receive interest on the principal sum during the coming years. (f) How much is it worth to have the money paid over once for all, without being subject to the contingencies that may arise in weekly collections extending over a period of 16 years? (g) How much is it worth to avoid publicity?

In conclusion we may add that these settlements may be made at any time up to the day of trial, and may be made either before or after prosecution has been commenced.

This brings to an end our consideration of the law as it is applied to fornication and bastardy proceedings in Philadelphia County today, and the next subject of inquiry is the legal status of an illegitimate child.

IV. THE LEGAL STATUS OF ILLEGITIMATES IN PENNSYLVANIA.

The legal status of a person is indicated largely by his right to a name, his right to vote or hold public office, and his rights of property and inheritance. By a series of slow but steady advances, the position of an illegitimate in Pennsylvania has progressed from the early English notion of a *"filius nullius"* without rights of name or inheritance—which was the accepted view in Pennsylvania up to the year 1855—to the present position of an illegitimate, which affords him on his mother's side all the rights and privileges of a legitimate child. Thus the act of July 10, 1901,[70] provides that an illegitimate shall take the name of the mother, and that between it and its heirs and the mother and her heirs, it shall "enjoy all the rights and privileges * * * in the same manner and to the same extent as if (it) had been born in lawful wedlock." The act further provides that the child shall be considered "of the half blood" of other children, legitimate or illegitimate, of the same mother. In other words an illegitimate child is in exactly the same legal position on the mother's side as a legitimate child, and the act expressly states that the "intent of

[70]P. L. 639, 2 Purd. Dig. 2005.

the statute is to legitimate an illegitimate child as to its mother and her heirs; but is not intended to change the existing law with regard to the father of such child."

The existing law with regard to the father of such child is, as we have seen, that the child has no claim of any kind upon the father, with the exception of the order of support made in fornication and bastardy proceedings. It not only has no right of inheritance in the father's estate, but, as we have seen, cannot even collect the order of support out of a deceased father's estate, unless the act of 1907 shall be held to have changed the law.[71] There would seem to be no just reason why, after a jury has adjudged a man to be the father, he should be allowed to escape all responsibility beyond the order of court, while at the same time the child is limited to inheritance from the mother alone, a right which, in these cases, is usually of no practical significance whatever. After the verdict of a jury has established the fact of paternity, the child should inherit from the father and the father's children in exactly the same way that he is now allowed to inherit on the mother's side.

Aside from this question of inheritance from the father, an illegitimate is not discriminated against in Pennsylvania or under the laws of the United States. He receives the same protection of the laws, and is entitled to vote and hold office in the same way as a legitimate person, even to holding the office of President of the United States.

V. BIRTH REGISTRATION.

All births within the State of Pennsylvania must be registered within 10 days in the office of the local registrar of the district where the birth occurred.[72] The certificate, which must be made out by the attending physician or midwife, or if none, then by the father or mother of the child or other responsible person, must contain the name[73] and sex of the child and whether legitimate or illegitimate, the name, color, residence, age and occupation of both the father and mother.

The same law also makes provision for the registration of all deaths occuring in the state.

Stillborn children must be registered both as a birth and as a death. Midwives are not permitted to sign certificates of death for stillborn children. If there is no attending physician, the undertaker

[71] See ante, p.

[72] Act of June 7, 1915, P. L., 900.

[73] If not named at the time of filing the certificate, the name may be filed in a supplemental certificate later.

must notify the registrar, who in turn notifies the local health officer to investigate and report on the case. The certificate in the case of stillborn children must state the cause of "the stillbirth if known, whether a premature birth, and if so, the period of uterogestation in months, if known."

The original certificate of birth and death are forwarded to the State Registrar at Harrisburg and a copy kept in the district office where filed.

The attending physician or midwife is the person who collects the information and signs the birth certificate. It therefore falls upon him or her to determine whether the child should be registered as legitimate or illegitimate. As no printed instructions are issued to physicians or midwives regarding the execution of the certificates, it is likely that many errors occur in answering the important question of legitimacy. For instance, the mother may tell the physician that she has never married the father of the child, meaning that she has never been through any form of ceremony with him. The physician therefore registers the child as illegitimate, although there may exist a valid common law marriage, which, as has been pointed out, renders the children legitimate.

As a matter of fact, though the blank form of certificate calls for the same information where the birth to be registered is an illegitimate one as in the case of legitimate children, the certificates of illegitimate children are accepted and filed, even though they do not state the name or any further information regarding the father. If the mother refuses to tell the physician the name of the father, the bureau makes no effort to obtain the information.

The law provides that any person may obtain a certified copy of a record upon the payment of 50c. It would perhaps be better if the information contained in the files could only be obtained by the immediate family concerned, or upon satisfying the registrar of the existence of a proper interest.

VI. GENERAL OBSERVATIONS AND COMPARISONS.

In connection with its report on the law of Pennsylvania concerning illegitimates, the committee has also made a somewhat limited study of the substantive and administrative features of the law of other jurisdictions.

It is gratifying to discover, therefore, that in most particulars the laws and procedure in force in Philadelphia County compare most favorably with the most advanced measures in other jurisdictions.

Both in England and Germany the order of support is made until the child reaches 16 years of age, though the order is somewhat less in amount than in Philadelphia, and particularly is this so in England. In Massachusetts the orders are now made until the child reaches the age of 21 years.

The German procedure, where a father is in arrears, provides for sending him to the workhouse for a period not exceeding two years, during which time his earnings are devoted to the support of the child. The father is also compelled to maintain the mother for six weeks after confinement.

Both in England and Germany the courts take no action where there is evidence that the mother had illicit relations with other men at or about the time of conception. In Denmark, as we have seen, the principle of contribution by all the guilty parties, is applied to this situation.

In Germany the laws relating to name and inheritance are very similar to the laws of Pennsylvania, and there is no right of inheritance from the father. In England the child cannot inherit from any one.

Italy has an obligatory maternity insurance, and all women between 17 and 45 years of age, who are earning less than a prescribed minimum wage are compelled to contribute to this insurance. In Germany maternity cases are included within obligatory sick insurance.

One of the most interesting administrative features in any jurisdiction, is in force in Berlin, where there is a City Department of Guardianship for illegitimates. Formerly the Court of Guardianship appointed an individual as guardian for each illegitimate. Women who were thus appointed guardians were permitted to decline the responsibility, but any man appointed was, in the absence of a valid reason, compelled to act, or else be disenfranchised or fined. The result was unsatisfactory, as the services were grudgingly given and therefore were inefficient. The City has now, therefore, organized a regular City Department at the head of which is one officer who is responsible for all the illegitimate children in the city. This officer is surrounded by a corps of assistants, whose duty it is properly to supervise the bringing up, education, vocational training and even the later apprenticeship of these children. Apparently the work of this department has been very effective.

VII. RECOMMENDATIONS.

As a result of the foregoing study, the committee would offer

certain recommendations for the improvement of the law and procedure. The first five recommendations can be put into effect without any legislative enactments. The last six recommendations will require the passage of new statutes.

(1) An attempt should be made to establish among the neighboring states a comity which will recognize the offence of fornication and bastardy as extraditable. At the present time there is no method of bringing a man to justice after he has crossed the state border.

(2) A larger appropriation should be made to the District Attorney's office for the purpose of bringing a man back from one county of Pennsylvania to another for trial. Under the present procedure there is not sufficient money on hand to cover all the cases, and some are obliged to suffer in consequence.

(3) *Valid* security should be required of a man against whom an order has been made. A reasonable suggestion was made by a Chicago judge to the effect that the court should accept security for two years, and then require a renewal of security for similar periods. It would, of course, be easier for the man to obtain security where the liability of the surety was limited to two years, than where it extended over a period of sixteen years.

(4) Where a mother, owing to her condition, has been incapacitated for work for several weeks prior to the birth of the child, the order should include her expenses during incapacity. In view of the recent decisions of the court, we believe that the provisions of the present statute can fairly be held to cover such cases.

(5) All petitions for the adoption of minors under 14 years of age, should be referred to a probation officer for investigation, before the decree is signed.

(6) Statuory provision should be made whereby an agreement entered into between the father and mother for the support of the child, could be approved by a judge of the court having jurisdiction, and would thereafter have all the force and effect of a sentence of the court, upon conviction by a jury.

(7) The law should be amended so that orders of support could be made to date from the birth of the child, and not merely from the date of conviction; and also so that orders could be modified by the court at any time subsequent to conviction, upon petition showing cause. This would render the orders flexible, and would enable the court to increase or decrease them according as subsequent change of circumstances warranted.

(8) The law should be altered so that orders of support could be proved against, and collected from, the estate of a deceased father.

(9) The so-called "Stone-pile Act" should be amended to include the failure to support illegitimate as well as legitimate children; and also be amended in title to avoid the present objection to its constitutionality.

(10) After compliance with, or the expiration of, the order of support in fornication and bastardy proceedings, a father should continue liable for the support of the child to the same extent to which he would be liable for the support of a legitimate child. This would cover a case, where, for example, a child became a cripple and unable to support himself at the age of 17 or 18. It would also cover a case where the child died at that age and thereby necessitated an outlay of money for funeral and burial expenses.

(11) After the jury has found a verdict of guilty and thereby established the fact of paternity, the child should have all the rights of inheritance on the father's side to which a legitimate child would be entitled, and should be considered a half-brother or half-sister of all other children of the same father. This would make the child's rights of inheritance on the father's side the same as they now are by law on the mother's side; and *would place the child in a position equivalent to that of a child of divorced parents. This is the status which we believe an illegitimate child should occupy.* Such rights of inheritance will go a long way toward removing the stigma attaching to illegitimacy, and at the same time need not adversely affect the parents in any way, for any parent may, of course, by will, dispose of his or her entire estate without making any provision whatever either for legitimate or illegitimate children.